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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 217

JOSEPHINE GOSS, ET AL., PETITIONERS

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.

HENRY C. MAXWELL, JR., ET AL., PETITIONERS

v.

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Goss* (R. 157–164) is reported at 301 F. 2d 164. The opinion of the United States District Court for the Eastern District of Tennessee (R. 119–137) is reported at 186 F. Supp. 559.

The opinion of the United States District Court for the Sixth Circuit in *Maxwell* (R. 282–284) is reported at 301 F. 2d 828. The first findings of fact, conclusions of law, and judgment of the United States District Court for the Middle District of Tennessee (R. 228–243) are reported at 203 F. Supp. 768. The second findings of fact, conclusions of law, and judgment (R. 269–273) are not reported.

JURISDICTION

The judgment of the court of appeals in the *Goss* case was entered on April 3, 1962 (R. 156–157). The judgment of the court of appeals in the *Maxwell* case was entered on April 4, 1962 (R. 281). The petitions for writs of certiorari were granted by this Court on October 8, 1962, limited to the first question presented by the petition (371 U.S. 811; R. 285). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the transfer provisions in the plans of school desegregation approved by the courts below, which provide for automatic transfer solely on grounds of race out of the integrated school to which a pupil is assigned on the basis of residence back to his former segregated school, invalidates those plans as remedies for the denial of petitioners' rights under the equal protection clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The instant cases are the first school desegregation cases that this Court has agreed to review on plenary

hearing since *Cooper* v. *Aaron*, 358 U.S. 1. They present a significant question regarding the permissible means to effectuate school desegregation. The question is also one about which lower federal courts have disagreed. Compare the views of the Sixth Circuit expressed in *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209, certiorari denied, 361 U.S. 924, and the opinions below, with the holdings of the Fourth and Fifth Circuits in *Dillard* v. *School Board of City of Charlottesville, Va.*, 308 F. 2d 920, and *Boson* v. *Rippy*, 285 F. 2d 43.[1]

It is now over eight years since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, when state authorities became "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." *Cooper* v. *Aaron*, 358 U.S. 1, 7. As a consequence, 255,367 of the 3,279,431 Negroes of school age living in the southern and border states and the District of Columbia—representing 7.8 percent—have come to attend biracial schools.[2] To some, this represents great progress in bringing about

[1] Two district courts have also refused to approve desegregation plans containing transfer provisions similar to those involved in this case. See *Mapp* v. *Board of Education of City of Chattanooga*, 203 F. Supp. 843 (E.D. Tenn.); *Vick* v. *County Board of Education of Obion County*, 205 F. Supp. 436 (W.D. Tenn.).

[2] 243,150 of these Negroes (95.2 percent) live in Delaware, District of Columbia, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia. See *Statistical Summary of School Segregation-desegregation in the Southern and Border States*, p. 3, published by the Southern Education Reporting Service (November 1962).

changes in deep-rooted social patterns; to others, the pace has been too slow. The realization of the rights enunciated by this Court in *Brown* v. *Board of Education*, is of extreme importance to millions of American citizens, and the attainment of a nation-wide system of non-discriminatory public education with the least disturbance or other interference with public education is of vital interest to the country as a whole.

The United States has participated in the two previous cases in this Court involving school desegregation problems. We believe that in these cases, because of the nature of the issue presented and the disagreement of the lower courts, it is again incumbent upon the United States to express its views.

STATEMENT

These actions were initiated by Negro pupils and their parents to desegregate the public schools in Knoxville, Tennessee, and Davidson County, Tennessee (an area adjacent to the City of Nashville.)[3] Both suits were brought as class actions under Rule 23(a)(3), F.R. Civil P., against the local school authorities seeking injunctive and declaratory relief to obtain desegregation in accordance with *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294.[4] In each case the jurisdiction of the district court was invoked pursuant to 28 U.S.C. 1331, 1343, 2201, and 2202 and rights

[3] The *Goss* case was filed on December 11, 1959, in the District Court for the Eastern District of Tennessee (R. 5). The *Maxwell* case was filed on September 19, 1960, in the District Court for the Middle District of Tennessee (R. 165).

[4] As early as August 17, 1955, the Knoxville School Board recognized that it was required to take steps to implement the

were asserted under 42 U.S.C. 1981 and 1983 (R. 5–6, 171–172).[5] In both cases, the school authorities acknowledged by their answers that they were continuing to operate racially segregated public school systems (R. 27, 202).[6] After directions from the trial courts to present desegregation plans (R. 29, 208), both boards

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Brown decision. Various study groups were formed and eventually eight possible plans of desegregation were presented to the school board. At a meeting on May 11, 1956, the school board announced that the plans had been studied but all had been rejected because it "did not feel at that time that desegregation of the Knoxville Public Schools could be successfully put into operation" (R. 43–46, 122–123).

It does not appear that the Davidson County School Board took any steps to implement the *Brown* decision prior to the institution of this suit (R. 190, 202, 204).

[5] In the *Maxwell* case, the plaintiffs also attacked the assignment of school personnel on the basis of race and requested that any desegregation plan provide for the assignment of teachers, principals, and other school personnel on a non-racial basis (R. 174–175, 184).

[6] The answer of the defendants in *Goss* said (R. 27): "It is therefore stated to this Court that the said defendants do not for one moment admit to any dereliction of duty on their, or their predecessors' part in not having hastened to obey the Supreme Court's pronouncement. Two duties of these defendants have sharply clashed, the one to obey the Constitution of the United States as so recently interpreted, the second to honor and respect an allegiance to our community and its members which incorporates in its very fabric a careful protection of our cherished institutions. More particularly, there is the absolute compulsion to seek ever for efficient, undisturbed and continuous schooling, unmarred by the possibility of interruption from drastic unpopular change. The defendants have simply discharged the responsibilities of their offices in the only way that a proper reconciliation of conflicting allegiances has permitted. The defendants owe no apologies to anyone, and make none."

adopted plans to desegregate one school grade each year over a twelve-year period beginning with the first grade in 1960 in Knoxville and in 1961 in Davidson County (R. 30; 214). While there were differences in wording, the two plans were substantially the same. Both contained provisions for rezoning of schools without reference to race, and for a system of transfers.

The transfer rule, which is at issue in this case, provides that, in certain instances, pupils may obtain transfers from the schools in their zones of residence to other schools. The Knoxville plan, which is essentially the same as the Davidson County plan, provides (R. 31–32):

> 6. The following will be regarded as some of the valid conditions to support requests for transfer:
>
> a. When a white student would otherwise be required to attend a school previously serving colored students only:
>
> b. When a colored student would otherwise be required to attend a school previously serving white students only:
>
> c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race.

Both plans also contain general provisions stating that transfers will be granted when "good cause" is shown.[7]

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[7] The Knoxville Plan provides (R. 31):

"5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given

Petitioners filed in the respective district courts written objections to both plans including specific objections to the above quoted transfer rule (R. 32–34, 215–219).[8] In each case the district court held a hearing to consider the adequacy of the plan.

The Evidence and Lower Court Holdings in the Goss Case.[9]—Dr. Burkhart, the president of the Knoxville school board, testified that the transfer provision was intended to provide for "hardship circumstances" (R. 85). When asked, "* * * this feeling of the board that there should be provision for transfers based on race—this is attributable to the board's feel-

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full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration."

The Davidson County Plan provides (R. 214):

"4. Application for transfer of first grade students, and subsequent grades according to the gradual plan, from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration."

[8] The objection in the *Goss* case was as follows (R. 34): "Paragraph six (6) of the plan violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that said paragraph provides racial factors as valid conditions to support requests for transfer, and further in that the racial factors therein provided are manifestly designed and necessarily operates to perpetuate racial segregation."

[9] The record mainly relates to the adequacy of the twelve-year plan of desegregation, but, since this matter is not here under review, our statement of facts is limited to matters bearing on the transfer plans.

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ing with regard to the hostility of the community to this sort of change; is that it?," he answered (R. 85):

> Not as much as to the effect that it might have upon the students. I would like to be clear on the matter that our primary concern is the education of our students, all of them. This is our prime concern.
>
> Other factors enter into our decision, but our primary concern is the orderly education of our students, both white and colored, in an effort to make available to the community the best facilities and instructional facilities that we can under the least possible circumstances which might be harmful.

Dr. Burkhart explained that the board thought it might be "harmful" to a certain number of white students to go to school with Negroes and also "it might be harmful to some of the colored students to go with white students if they didn't want to" (R. 85). He said the basis for this feeling was (R. 86):

> The fact that we are talking about two separate races of people, with different physical characteristics, who have not in our community been very closely associated in many ways and certainly not in school ways. And there would be a sudden throwing together of these two races which are not accustomed to that sort of thing. Either of them might suffer from it unless we took some steps to try to decrease that amount of suffering or that contact which might lead to that in case it did occur.

He stated that he did not necessarily refer to physical harm but was more concerned with "mental harm."

Dr. Burkhart testified that he did not know pre-

cisely what procedure would be used to notify students of their new school zones (R. 91–92), but he did indicate how he expected the transfer plan would operate (R. 93–94):

> Q. I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively?
>
> A. We doubt that they will.
>
> Q. As a matter of fact, none have remained in the City of Nashville, have they?[10]
>
> A. I don't know. * * *
>
> Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not?
>
> A. Yes, sir.

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[10] The Knoxville and Davidson County transfer provisions were copied from the Nashville desegregation plan (R. 219). The experience under the Nashville plan is summarized in Report of the United States Commission on Civil Rights, *Civil Rights U.S.A./Public Schools Southern States 1962*, pp. 115–116: "After 3 years of desegregation, only 13 percent of the Negroes eligible to attend white schools were doing so. No exact figures are available for the 1961–62 year, but school officials estimate the percentage is appreciably higher—perhaps 20 percent. After 3 years, there were no whites in Negro zones attending a Negro school. Last year, there were only the two attending the Negro Pearl Elementary School. There have been no recent figures compiled on the number of whites originally assigned to Negro schools, but when desegregation began in 1957 there were 55, all in the first grade. Projecting this known figure to five grades, the total number would have been 275 in 1961–62."

Q. And if he applied for transfer out of his zone to a school which has been formerly serving white students only, then his application would be denied under this plan, would it not, sir?

A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.

* * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of this plan?

A. Yes, sir."[11]

Mr. Marable, a school administrator in charge of handling transfer requests, described the system used before the plan involved in this case was adopted (R. 112). He said that transfer requests were evaluated on a case by case basis, no specific rules were followed, he was vested with great discretion, and generally transfers were granted for "hardship cases and convenience" (R. 112–117).

The district court, with one modification, approved the Knoxville desegregation plan, but did not discuss the transfer provisions in its memorandum opinion

[11] School board member Ray also acknowledged that the operation of the transfer provision would tend to perpetuate segregation (R. 104). Another board member, Dr. Moffett, stated that the transfer provisions "[a]t least give the opportunity" to perpetuate segregation as they are availed of by students or parents (R. 108).

(R. 119).[12] During the trial, the court indicated that it regarded itself as bound by the Sixth Circuit's prior approval of an almost identical provision in the Nashville, Tennessee, school case (*Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209, 228, certiorari denied, 361 U.S. 924) (R. 94).

After the district court's decision, the school board adopted a resolution providing for administration of the transfer provision as follows: "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended" (R. 141).[13] This procedure avoided assigning students to schools within their new zones and then requiring them affirmatively to seek a transfer if they desired to take advantage of the transfer provisions of the plan. Rather, students were given the option to enroll in the school previously attended, *i.e.*, the segregated school (R. 145, 151). Petitioners, claiming that this administrative device further demonstrated that the transfer plan would perpetuate segregation, moved for a new trial (R. 138–155).[14] The motion was denied by the district court (R. 155).

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[12] The district court approved the Knoxville desegregation plan in all respects except that it required the school board to re-study and resubmit a plan relating to an all-white vocational school offering technical courses not available to Negro students.

[13] As of January 22, 1960, 78 percent of the students in Knoxville were white and 22 percent were Negro. There were 30 white schools and 10 Negro (R. 260). The record does not indicate which of these schools were elementary schools and which were high schools.

[14] Petitioners alleged that (R. 154): "(b) Under the plan, as elucidated by the procedure established in said policy, pupils will be assigned routinely to said Negro and white schools ac-

The court of appeals approved the transfer provision (R. 162; 301 F. 2d at 168).[15]

The Evidence and Lower Court Holdings in the Maxwell case.—J. E. Moss, the Superintendent of Schools of Davidson County, testified that the effect of the transfer provisions of the Davidson County desegregation plan was to permit a child or his parents "to choose segregation outside of his zone but not to choose integration outside of his zone"; that the provision was identical to that in the Nashville plan; and that as it operated in Nashville and was intended to operate in Davidson County, white pupils were not actually required to go first to the Negro schools in their zones and then seek transfers out, and no Negro pupils who did not affirmatively seek a transfer to an integrated school were assigned to one (R. 219–220).

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cording to race, as in the past, without regard to non-racial school zones and without regard to a transfer procedure in which the pupil affirmatively seeks a transfer from his school in the non-racial zone to another school. (c) Said policy manifestly is designed to impede pupils' free choice to attend a school in their zone, and is designed to influence students or parents to remain in segregated schools, in that it readopts, as a part of defendant's official assignment policy under and pursuant to the plan, defendants' past policy of assigning pupils to racially designated schools."

[15] The court modified the district court's judgment "insofar as it approved the board's plan for continued segregation of all grades not reached by its grade-a-year plan," and remanded, instructing the district court "to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation" (R. 163–164; 301 F. 2d at 169). On June 25, 1962, the Knoxville School Board voted to double the rate of desegration by opening two grades a year instead of one. See Report of the United States Commission on Civil Rights, *Civil Rights U.S.A./Public Schools Southern States 1962*, p. 130.

Another witness, Dr. Eugene Weinstein, a professor at Vanderbilt University in Nashville, testified that the experience in Nashville was "mass paper transfers of whites back into what is historically the white school, of Negroes remaining in what is historically the Negro school," and that the transfer provisions tend to keep the system oriented toward a segregated system with token desegregation (R. 226).

The district court, while modifying some aspects of the desegregation plan submitted by the school board, approved the transfer provisions of the plan (R. 242).[16] As in the *Goss* case, additional proceedings were held in the district court after petitioners moved for further relief to object to the manner in which the transfer provisions were being administered (R. 244). The evidence showed that, as a result of the rezoning, 288 white children were in zones of the 7 elementary schools that were previously all Negro and 405 Negro children were in zones of the 62 elementary schools that previously were all white (R. 194, 252).[17] The

[16] The court modified the school board's twelve-year plan to require that the first four grades be desegregated as of January 1, 1961, with an additional grade to be desegregated each September thereafter until all grades were covered (R. 240–242). The court also refused injunctive relief to several plaintiffs in higher grades that were still segregated who sought admission to white schools nearer their homes as exceptions to the plan (R. 241–242, 269–270). With respect to petitioners' request that the school board eliminate segregated teacher and personnel assignments, the court reserved judgment (R. 241–242).

[17] As of September 1960, 95 percent of the students in Davidson County were white and 5 percent were Negroes. There were 62 white elementary schools, 16 white high schools, 7 Negro elementary schools, and one Negro high school (R. 194).

school authorities sent notices to the parents of these 693 students asking them to indicate within three days whether they requested permission for the children to stay at the school previously attended (*i.e.*, the segregated school) or requested permission for a "transfer" to the newly zoned school (R. 247–250).[18] Petitioners contended that these notices were misleading and encouraged the continued maintenance of racial segregation in that assignments were actually to a segregated school from which there must be a transfer out (R. 245). The district court held that the notices were adequate and unobjectionable.[19]

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[18] Of this group, only fifty-one pupils, all of them Negroes, asked to attend the school in the new zones (R. 265).

[19] In its second findings of fact, conclusions of law, and judgment the court considered further the question of teacher assignment on a racial basis. The court indicated that it did not believe that this issue had been finally settled by the *Brown* case but recognized that serious problems were presented under the equal protection clause of the Fourteenth Amendment (R. 271): "Particularly is this true when the Court considers the fact that a plan has been approved for Davidson County which includes a very liberal transfer provision. When this provision, although it is on a voluntary basis, is coupled with a policy (and the Court is not now finding that the policy exists in Davidson County) which would assign teachers on the basis of race, then a serious question is presented to the Court as to whether there is not actually being thereby perpetuated the very condition which the Supreme Court said could not be perpetuated, and this is a segregated system of public schools * * *. The Court finds that it is not necessary to determine the question relative to the assignment of school teachers and other personnel at this time for the reason that the Court does not believe (even if it should now hold and declare that the plaintiffs do have the right to attend a school system where race is not one of the factors considered in the assignment of teachers) that an injunction should issue at this time." The court stated that the plaintiffs could renew this question at a later date (R. 272).

On appeal, the court of appeals approved the transfer provision on the authority of its decisions in the *Kelley* and *Goss* cases (R. 284; 301 F. 2d at 829).

SUMMARY OF ARGUMENT

This Court held in *Brown* v. *Board of Education*, 349 U.S. 294, 301, that racial desegregation of the public schools must proceed "with all deliberate speed." Compliance with this obligation requires the elimination of segregation as soon as possible. We recognize that school segregation is often merely one part of a deep-seated pattern of racial discrimination which, while contrary to national policy, currently enters into the make-up of many children, both white and colored. Any interim plan for desegregation can properly take account of educational problems. Therefore, while mere hostility to desegregation is not a relevant factor, a district court or school board is not required, given present conditions, to omit suitable provisions for meeting any problems of adjustment affecting the educational development of individual pupils.

The transfer plans in these cases, however, cannot be justified as an essential part of sound school administration. They are not adapted simply to promoting the educational welfare of individual children.

A. The transfer plans were based solely on race and therefore plainly are inconsistent with the Fourteenth Amendment. Negro children living in areas where the

school was formerly all-Negro and presently has a majority of Negroes are not permitted to transfer whereas white children having a residence in the same area can transfer. The only basis for the different treatment is the difference in race.

It is irrelevant that white children in a residential zone where the school was formerly all-white and which presently has a majority of white students cannot transfer whereas Negro students in this same zone can transfer. Superficial equality of treatment was rejected in *Brown* v. *Board of Education,* which held that a separate-but-equal public school system was unconstitutional. Moreover, the right to nondiscriminatory treatment is a personal right; the right of some Negro children to be treated the same as white children in the same circumstances cannot be denied on the ground that other Negro students have rights denied to white students.

B. The transfer plans tend to preserve segregation. They allow any pupil to transfer from a school which formerly served only the other race, or from a school which is presently composed of a majority of the other race. This means that students are free to return to their old racial environment but not to transfer to a new racial environment. Thus, the transfer provisions invite immediate and continuous resegregation solely upon the basis of race. This was the intent of the proponents, and the intent is confirmed by their actual operation.

C. Just as the burden is on the school board to justify delay in according Negro children their constitutional rights (*Brown* v. *Board of Education, supra*), so does a school board have a heavy burden to justify provisions in the desegregation plan which reintroduce racial classifications and appear to support resegregation. At the least, the school board must demonstrate convincingly that the provisions are necessary to meet educational problems.

Here, no such evidence exists. No proof was even offered that the transfer provisions were needed to effect an orderly transition. The only possible legitimate objective they could have had was to alleviate any educational problems individual students might have in adjusting to a school where the overwhelming majority of students were of a different race. But the provisions under review were badly designed to meet this purpose. They would allow students to transfer even when the school was racially balanced, or even when a majority of students were of their own race if the school formerly served a different race.

More important, there are practical alternatives—which are not based on racial criteria and do not support segregation—for meeting any legitimate educational problems in requiring students to attend a school predominantly composed of students of a different race. For example, a school board could allow any student who desired to transfer to

do so, thereby allowing all students the opportunity to attend desegregated schools, instead of merely those living in particular areas. This plan has been followed in large cities with substantial Negro populations, such as Louisville and Baltimore. The school board could also attempt to eliminate the problem of a small minority of students of one race in a school largely composed of another by drawing residential zones in order to introduce a greater balance. Or the school board could apply transfer provisions based on educational and psychological criteria which would apply to children on an individual basis. Such provisions, which are not based on race, have been upheld by the lower courts.

ARGUMENT

We read the plans of the school boards in these cases and also the decrees below as directed to the existing situations in Knoxville and Davidson County—to a period of transition from racially segregated schools to a school system fully complying with the equal protection clause of the Fourteenth Amendment. In each case the district court retained jurisdiction of the action "during the period of transition" (R. 138, 242). The court of appeals specifically noted, with respect to the transfer plan, that (R. 162):

> The trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands.

No transfer plan explicitly based upon race is permanently acceptable under a Constitution that prohibits state action in which race or color is the determinant. See *infra*, pp. 22–23. The critical issue in this case, however, as we read the decrees below, is whether the Knoxville and Davidson County transfer plans may be put into effect today, during a period of transition, consistently with this Court's ruling that school districts shall proceed to full integration "with all deliberate speed." *Brown* v. *Board of Education*, 349 U.S. 294, 301.

Compliance with this obligation in a manner that takes into account "the public interest in the elimination of * * * obstacles in a systematic and effective manner" (*id.* at 300) calls for the accommodation of two prime objectives. First, the plan must move ahead towards complete compliance with the Fourteenth Amendment's requirement of "a racially nondiscriminatory school system." *Id.* at 301. Although *Brown* and *Cooper* v. *Aaron*, 358 U.S. 1, involved admission to school and the opinions speak chiefly in those terms, it is too plain for argument that the equal protection clause prohibits the administration of any aspect of public education upon the basis of race, and therefore the elimination of any such discrimination is an essential aim of every decree.

Second, since the welfare of the children is the central purpose of all public school education, any interim plan must take into account their individual intellectual and psychological development affecting education. In many communities school segregation has been merely one part of a deep-seated social pat-

tern, originating in slavery and continuing through racial segregation and discrimination. The evil must be eliminated. The current existence and deep roots of the social pattern are nevertheless temporary facts which have left their effect upon many children, both white and colored. Neither hostility to desegregation nor disapproval of basic constitutional principles is a relevant factor in formulating a plan or determining the speed of transition (*Brown* v. *Board of Education*, 349 U.S. 294, 300; *Cooper* v. *Aaron*, 358 U.S. 1, 7), but, given the present facts, a district court or local school board is not required to omit from its plan of transition suitable provisions for avoiding educational damage to individual pupils as a result of too sudden a forced reversal of rooted habits.[20]

The transfer plans approved by the courts below were ostensibly designed to meet these objectives of wise school administration. See the Statement, *supra*, p. 8. We have no quarrel with that purpose. Given existing conditions, requiring a particular white child who had always lived a sheltered life in a rigidly segregated community suddenly to go to an overwhelmingly Negro school might create problems of adjustment interfering with the individual's educational development. Conversely, forcing a Negro child to break away from his established pattern and attend an all-white school might in some circumstances impair his development. In our view, the constitutional obligation to desegregate the schools "with all deliberate speed" does not require blindly forcing

[20] Under these circumstances, the school board has an initial obligation to prepare students for desegregation so as to lessen the educational and psychological problems.

white children now to attend overwhelmingly Negro schools or Negro children now to attend overwhelmingly white schools at the sacrifice of their individual welfare. School authorities may properly take such problems of individual adjustment into account along with the equally important problem of avoiding psychological or educational damage to Negro children as a result of forcing them to attend all-Negro schools.

Despite its announced objective the transfer plan involved in these cases fails to satisfy the requirements laid down in *Brown* v. *Board of Education, supra*. In our view the plan has three interrelated defects:

1. It introduces into the administration of public education in Knoxville and Davidson County a plan of transfers based solely and explicitly upon race, rather than individual welfare.

2. It tends to preserve the old system of segregated schools by authorizing, upon explicit racial grounds, automatic self-assignment to the school attended under segregation.

3. It ignores the availability of other tested methods of securing the educational welfare of children related to problems of adjustment, which are consistent with the Constitution.

Whatever might be the consequence of any one of these defects standing alone, taken together and in a context of extreme dilatoriness in proceeding to desegregation, they vitiate the Knoxville and Davidson County plans for redressing the violations of petitioners' constitutional rights. In the remainder of this brief we shall discuss these three objections.

A. THE PLAN OF PUPIL TRANSFERS BASED SOLELY UPON RACE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Classifications based on race have been repeatedly held by this Court and by the lower federal courts to violate the equal protection clause of the Fourteenth Amendment. Perhaps the most famous enunciation of the principle was by Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson,* 163 U.S. 537, 554, 559:

> [T]he Constitution of the United States does not * * * permit any public authority to know the race of those entitled to be protected in the enjoyment of * * * [civil] rights.
>
> * * * * *
>
> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. * * * The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

More recently, this Court has stated that racial classifications are "obviously irrelevant and invidious." *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U.S. 192, 203. Nor is the constitutional right to equality limited to any class of situations or category of state action. The Fourteenth Amendment prohibits any "state action in which color (*i.e.,* race) is the determinant * * *. The factor of race is irrelevant from a constitutional viewpoint." *Baldwin* v. *Morgan,* 287 F. 2d 750, 754 (C.A. 5). Consequently, this Court has held unconstitutional a variety of racial classifications involving, for example, juries (*Strauder* v. *West Virginia,* 100 U.S. 303;

Norris v. *Alabama*, 294 U.S. 587), public education (*Brown* v. *Board of Education*, *supra*), parks (*New Orleans City Park Improvement Assoc.* v. *Detiege*, 358 U.S. 54; *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 (C.A. 4), affirmed, 350 U. S. 877), and restaurants in publicly owned buildings (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715). The use of race as the criterion for transferring pupils is no less unconstitutional than the use of that distinction in their admission to school.

Both the Knoxville and Davidson County plans make race a sole and explicit criterion for transferring a student from one school to another. Paragraph 6 of the Knoxville plan provides that a transfer will be automatically approved—

> a. When a white student would otherwise be required to attend a school previously serving colored students only;
>
> b. When a colored student would otherwise be required to attend a school serving white students only;
>
> c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race.

No words could make it clearer that the test is one of color.

The superficial equality which the plan accords white and Negro children by enabling each race to leave an integrated school does not save it from invalidity. A similar argument was made in defense of the separate-but-equal public schools existing prior to *Brown* v. *Board of Education*. Under that system white children were required to go to school only with

other white children just as Negro children could only go to school with Negroes. Nevertheless, this Court held that this racial classification violated the rights of Negro children.

Moreover, the right to non-discriminatory treatment is a personal right. See *Brown* v. *Board of Education, supra*; 349 U.S. at 300 ("[a]t stake is a personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis"); *Sweatt* v. *Painter*, 339 U.S. 629, 634; *Sipuel* v. *Board of Regents*, 332 U.S. 631, 633. Thus, in *Shelley* v. *Kraemer*, 334 U.S. 1, it was argued that a restrictive covenant based on race could validly be enforced against Negroes by a state court since the court would also enforce similar covenants against white persons. This Court, however, rejected the contention (*id.* at 22):

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitions to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

The extent to which the transfer plan makes race the criterion is emphasized by the fact that it operates solely in the direction of resegregation. White students may transfer out of any school which formerly served Negroes. Negroes may leave any school which formerly served whites. But no Negro has the same

automatic privilege to leave a school that served Negroes in order to attend integrated classes.

The omission underscores the purely racial character of the differentiation. White students living in a residential zone where the school was formerly all-Negro and is still attended by Negro students have the right to transfer, but Negro students who live in the same area are not allowed to transfer, even though they might equally benefit from the change. Obviously the personal constitutional rights of these Negro students are denied by the racial classification.

The foregoing aspect of these transfer plans emphasizes what is already apparent on their face—that the criterion is not the equal welfare of all children without regard to race; it is race, and race alone. In emphasizing this point we fully recognize that in some communities, during the transitional period, measures for accomplishing desegregation may create individual educational problems, and that it is wise school administration to take such transitional problems of personal adjustment into account even when they originate in customs fixed by race. An interim plan adapted to this purpose, if sincerely aimed at abolishing racial discrimination in the schools, would provide means for not only alleviating problems of individual children who would suffer from difficulty in adjusting to a school where they were numerically overwhelmed by a different race, but also for meeting the problems of Negro children who would otherwise suffer from a segregated education because they happened to live nearest a school in an overwhelmingly Negro part of the community. Such a plan, moreover, would be framed in terms of the welfare of indi-

vidual children and would take some account of circumstances other than race or color. The problems of adjustment of a nervous boy or girl, who has lived in a segregated community, when forced to attend a school where all the other pupils are of a different race, are very different from those of children in a school where the minority is much larger, and still different, no doubt, from those where the proportions are fairly equal.

It may be argued that in the early stages of transition administrative convenience requires a rule of thumb because the difficulties of investigating the situation of each child would be overwhelming. We do not agree that mere administrative convenience is a sufficient justification for making a classification according to race. In other contexts such problems may justify rough working distinctions, but the equal protection clause is more exacting when a State deals with fundamental personal rights. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535. In any event the record contains no evidence to support such a claim; and it is belied by the numerous pupil assignment laws upheld by the lower courts. Those laws which have been sustained make no mention whatsoever of race as a basis for transfer. *E.g.*, *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (N.D. Ala.), affirmed on limited grounds, 358 U.S. 101; *Parham* v. *Dove*, 271 F. 2d 132 (C.A. 8); *Carson* v. *Warlick*, 238 F. 2d 724 (C.A. 4). When race, as such, has been found to be a consideration affecting trans-

fers, the appellate courts have uniformly held the statutes to be applied invalidly. See, *e.g.*, *Norwood* v. *Tucker*, 287 F. 2d 798 (C.A. 8); *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (C.A. 5); *Green* v. *School Board of the City of Roanoke, Virginia*, 304 F. 2d 118 (C.A. 4); *Marsh* v. *County School Board of Roanoke, Virginia*, 305 F. 2d 94 (C.A. 4); *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72 (C.A. 4). Furthermore, other communities have developed entirely workable programs that meet pupils' needs without introducing invidious distinctions based solely upon race. See *infra*, pp. 36–40.

B. THE PLAN UNLAWFULLY TENDS TO PRESERVE SCHOOL SEGREGATION BY AUTHORIZING AUTOMATIC SELF-ASSIGNMENT, UPON EXPLICIT RACIAL GROUNDS, TO THE SCHOOL ATTENDED UNDER SEGREGATION.

A prerequisite of every acceptable plan of school desegregation is that it move definitely and expeditiously away from the old regime of racial discrimination. There is room for dealing with all genuine problems of school administration and pupil welfare. There is no room for nominal compliance followed by racial resegregation even though this be the wish of the local community. In *Brown* v. *Board of Education*, 349 U.S. 294, 300–301, the Court said:

> "* * * the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

> The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.

In *Cooper* v. *Aaron*, 358 U.S. 1, 7, the Court elaborated the meaning of the *Brown* decisions:

> Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable com-

pletion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

The school plans involved in these cases are in direct opposition to the Court's directions. Although they provide for substituting pupil assignments based upon zoning in place of racial segregation at the rate of a grade each year, they invite immediate and continuous resegregation solely upon the basis of race. Any white pupil may automatically transfer out of a school that formerly served Negroes, just because he is white. Any Negro may automatically transfer out of a school that formerly served white pupils, just because he is a Negro. These transfer provisions emphasize preservation of past unconstitutional patterns. The test is racial. The reference is to the character of the school under the prior unconstitutional pattern of racial segregation. The transfers operate only to preserve the past. A pupil may transfer out of a new school at which he will find students of both races, presumably to return to his old racial environment, but no one may transfer from his old school to a new racial environment. The transfers

can work only in the direction of segregation. A student who is assigned under the new zoning to an integrated school where most of the pupils happen to be of a different race may transfer out of the area to another school where conditions more nearly approach the old pattern of segregation. On the other hand, a Negro student who is assigned to a school that happens to be all-Negro has no right to transfer to a school attended by pupils of both races.

The extent to which these transfer plans preserve the past unconstitutional pattern is emphasized by the initial steps in their administration. The Knoxville school board adopting a resolution providing for the administration of the transfer provisions as follows (R. 139):

> All first grade pupils should either enroll in the elementary school within their new school zone *or in the school which they would have previously attended.* [Emphasis added.]

In other words, students were not even assigned to schools within the new residential zones and then permitted to apply for transfers if they were eligible to do so under the plan. Rather, they were from the very outset given the option to enroll in the school previously attended, *i.e.*, the segregated school. In Davidson County the school authorities sent notices to the parents of children who, as a result of rezoning, would be required to attend a school different from the one they were then attending. The parents were asked to indicate, within three days, whether they requested permission for the children to stay at the school previously attended (*i.e.*, the segregated school)

or requested permission for a "transfer" to the newly zoned school. Again, this permitted students to remain where they were rather than first being assigned to a newly zoned school and then requesting permission to transfer. Instead of focusing on the future and on arrangements for desegregated schools, these transfer plans look backward to the period when the schools were operated on an unconstitutional basis.

It is clear that the proponents of the transfer provisions anticipated that they will operate so as to preserve segregation. Thus, Dr. Burkhart, president of the Knoxville school board, testified (R. 93–94):

> Q. I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively?
>
> A. We doubt that they will.
>
> * * * * *
>
> Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not?
>
> A. Yes, sir.
>
> Q. And if he applied for transfer out of his zone to a school which has been formerly serving white students only, then his application would be denied under this plan, would it not, sir?
>
> A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.
>
> * * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of the plan?

A. Yes, sir.

Finally, the actual effect of the transfer provisions in this case shows how completely inconsistent they are with this Court's direction that school systems proceed to operate "on a racially nondiscriminatory basis with all deliberate speed." In Knoxville, pursuant to the grade-a-year plan that was approved by the district court, the first grade was desegregated in the fall of 1960. Eighty-five Negroes were eligible to enter previously white schools and 300 white students were eligible to enter previously all-Negro schools.[21] Twenty-nine Negro students actually entered nine of the "white schools", while all of the 300 eligible white students applied for and were granted transfers.[22]

Desegregation in Davidson County presents a similar picture. There, in January 1961, as a result of the rezoning required by the desegregation plan, 288 white children in the first through fourth grades were in zones of the 7 elementary schools that previously were all Negro (R. 194, 252). Taking advantage of the transfer provisions, all 288 students requested and were granted permission to remain in the all-white

[21] See *supra*, p. 11, note 13.

[22] See 1961 Report of the United States Commission on Civil Rights, *Education*, p. 52; Report of the United States Commission on Civil Rights, *Civil Rights U.S.A./Public Schools Southern States 1962*, p. 130. At the beginning of the second year of desegregation, a total of 51 Negroes in the first and second grades elected to attend the "white school" in their residential zone, again in nine schools.

schools that they had previously attended. Similarly, 405 Negro children were in areas that were served by the 62 elementary schools that previously were all white. Only 51 of these students elected to remain in these schools—thus "desegregating" them—while the remainder transferred to the Negro schools they had previously attended (R. 265).

In sum, the transfer provisions of the Knoxville and Davidson County school plans, by permitting automatic transfers back to the old segregated schools avowedly on grounds of race, vitiate the plans as programs of desegregation. For taken as a whole neither plan can fairly be viewed as a bona fide effort to eliminate racial considerations from the school system, temporarily tempered by the realization that previous social patterns may have to be taken into account in promoting the educational and psychological welfare of individual children. Instead, the plan says to the community, "The School Board will do everything possible by transfers to preserve the old pattern of segregated schooling save only in those instances in which geographical zoning enables a Negro to attend, if he wishes, an integrated school." More is required by the obligation to proceed "with all deliberate speed."

In this connection it is relevant to note the grudging and belated compliance in both Knoxville and Davidson County. See the Statement, *supra*, pp. 4–5, note 4. Thus, in the *Goss* case the court of appeals, in disapproving the grade-a-year plan as too slow, said (R. 161–162):

> It has been nearly eight years since the first *Brown* decision and under the plan before us

the first and second grades are now integrated. The evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision. That the operation of schools on a racially segregated basis is a violation of the Fourteenth Amendment and that the constitutional and statutory requirement of the state of Tennessee prohibiting the mixture of races in schools cannot be enforced are no longer debatable or litigable questions. This has been obvious and evident since May, 1954.

The position of the board that it would continue to operate under these unenforcible laws, until compelled by law to do otherwise, does not commend itself to the Court, for the acceptance of a plan that provides for a minimum degree of desegregation. In the second *Brown* case, the Court said, at p. 300: "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." In our judgment the defendants have not sustained this burden. We do not think that the twelve-year plan of desegregation adopted at this late date meets either the spirit or specific requirements of the decisions of the Supreme Court.

C. OTHER TESTED METHODS ARE AVAILABLE FOR SECURING THE EDUCATIONAL AND PSYCHOLOGICAL WELFARE OF CHILDREN DURING A PERIOD OF TRANSITION TO FULLY INTEGRATED SCHOOLS

Just as the burden is on a school board to justify delay in according Negro children their constitutional rights (*Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra*), so does a school board have a heavy

burden to justify provisions in the desegregation plan which reintroduce racial classifications and appear to support resegregation. At the least, the school board must demonstrate convincingly that the provisions will advance desegregation because they are the best way to meet serious educational problems, whether administrative or psychological, which would otherwise cause hardship or delay.

The record in this case does not indicate any educational problem, administrative or psychological, which the transfer provisions are intended to solve. No attempt was made to show that this type of provision is essential to attain an orderly transition to a nonsegregated school system. No proof was offered to demonstrate that whatever beneficial purposes the provision seeks to attain could not be achieved by some other means. So far as appears, the transfer provisions were intended merely to slow the process of desegregation. This objective, of course, is impermissible under this Court's decisions in *Brown* v. *Board of Education*, *supra*, and *Cooper* v. *Aaron*, *supra*.

The only legitimate objective which the transfer provisions could be supposed to advance is to promote the educational welfare of students by authorizing allowance for individual problems of adjustment, affecting a student's educational progress, which might result from requiring a few pupils to go to a school where the overwhelming majority of students are of a different race. The provisions under review, as we have seen (pp. 22–27), were badly designed to meet this purpose. They are phrased in terms of race, not individual welfare. Even in those

terms, which would seem categorically objectionable, one could easily write rules more adapted to the legitimate need. The first two provisions allow students to transfer from the school in their residential zone if the school formerly served only students of a different race, whether or not the majority of students in the school are now of a different race. The last provision allows any student to transfer from a school in which he is a member of a minority race even where 49 percent of the students are of his race. If the transfer provisions were really intended to protect students who are in a small racial minority—the only situation where serious educational or psychological problems seem likely—this could have been done more appropriately by allowing, for example, a student to transfer when only a small percent of the students were of his race. Such a provision, while we believe it invalid in these circumstances, would at least avoid the resegregation of a school which had a close racial balance by the withdrawal of all or most students of the race which was in a slight minority.

Even more important, there are practical alternatives—which are not based on racial criteria and which do not support segregation—for meeting any legitimate educational problems of the children affected.[23]

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[23] At the least, these alternatives appear to be practical and there is no indication in this record that they would not be so either in Knoxville or Davidson County. Since, as we have contended (pp. 34–35), the school boards had the burden of showing that the transfer plans were absolutely necessary to encourage desegregation, we must assume in the present posture of these cases that the alternatives would prove as practical in Knoxville and Davidson County as in the other places they have been tried.

First, the school board might allow any child who so desired to transfer to any school which had available space. This would mean that no child would be required to attend a school overwhelmingly composed of students of another race. On the other hand, all students would have the opportunity to attend schools which were desegregated—not just the few students who happened to be in mixed residential zones. Thus, the open transfer system would make no distinctions in terms of race, give full freedom of choice, and thereby encourage the desegregation of all the schools in the jurisdiction. And the practicability of this plan is demonstrated by its use in numerous big cities with large Negro populations, such as Louisville and Baltimore.[24]

Second, a modification of the open transfer plan is suggested by the opinion of the Court of Appeals for the Fifth Circuit in *Bush v. Orleans Parish School Board*, 308 F. 2d 491. There, the Orleans Parish School Board had requested the right to transfer children according to the provisions of the Louisiana pupil placement law. The court allowed the use

[24] In Louisville, the plan provides for redistricting without regard to race. Parents are advised that they can request transfers to schools outside of the district to which their children are assigned, and they are asked to list three preferences as to schools. Transfers are granted on the basis of available space, convenience for the child, and individual preferences. It is reported that 90 percent of the parents requesting transfers have received their first choice. Wey and Corey, *Action Patterns In School Desegregation*, pp. 97-98. In Baltimore, there are no geographic school districts. A child may transfer from the school he is then attending to any school in the city, with the approval of the principals involved. *Id.* at pp. 99, 148.

of the placement act, but went further than merely ordering the authorities to use it non-discriminatorily. Because of past incidents of total withdrawal of white children from schools which were ordered desegregated, the court gave the Negro children the right to follow migrating white pupils. The order read (*id.* at 502):

> Negro children who attended formerly all-white schools in 1960–61 and 1961–62 and Negro children who have registered for attendance at formerly all-white schools in 1962–63 and subsequent years may not be transferred or assigned to an all-Negro school against their wishes. If the transfer of white students from such schools would result in resegregation, the Negro children shall be afforded an opportunity to attend a nearby formerly all-white school without being subjected to tests for transfer under the Pupil Placement Act."

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[*] See also *McCoy v. Greensboro City Board of Education*, 179 F. Supp. 745 (M.D. N.C.), reversed, 283 F. 2d 667 (C.A. 4). There the Negro plaintiffs applied for admission to a white school. The school board agreed to admit Negroes to the school but at the same time granted transfers to the white children and teachers. The district court dismissed the complaint on the ground that plaintiffs had been admitted to the school of their choice. The court of appeals reversed and remanded the decision with instructions that the district court retain jurisdiction "so that the Board may reassign the minor plaintiffs to an appropriate school in accordance with their constitutional rights and so that the plaintiffs, if these rights are improperly denied, may apply to the court for further relief in the pending action." 283 F. 2d at 670. The court condemned the board's action on the ground that "although the colored children gained admission to a superior building, their desire to attend an integrated school was completely frustrated." *Id.* at 669.

Third, the desegregation plan of the school board might entirely or substantially eliminate the problem of a small minority of students of one race in a school largely composed of another by drawing the residential zones in a way which achieved a better balance in some or all schools. Any educational problems for the few students of the other race left in the zone of a virtually all-white or all-Negro school could then be solved on an individual basis. Were such measures adopted even the temporary transfer provisions here involved would be comparatively unobjectionable, for this method produces meaningful desegregation of the schools, in full compliance with the Fourteenth Amendment, instead of the merely technical desegregation which results from allowing a few Negroes to attend formerly all-white schools.

Fourth, where two schools exist, one formerly Negro and one white, relatively close to one another, the school board may assign all children, both Negro and white, formerly attending the lower grades in both schools (for example, kindergarten to third grade) to one school and all the children formerly attending the upper grades to another. The result is again to further the process of desegregation and, at the same time, to avoid assigning a small minority of children of one race to a school largely composed of children of another. This method, called the "Princeton Plan", after the city in New Jersey where it was employed, has also been used in numerous other communities in New Jersey and in Benton Harbor, Michigan, Willow Grove, Pennsylvania, and elsewhere. See Greenberg, *Race Relations and American Law*, p. 248.

Fifth, any educational problems, psychological or otherwise, resulting from requiring children of one race to attend a school largely composed of children of another race may be handled by a transfer provision not based on racial criteria. For example, in Dallas, Texas, initial assignments are made to neighborhood schools and transfers are then granted on an individual basis using the criteria of the state pupil placement law, which specifically forbids the consideration of race as a factor warranting transfer. See *Boson* v. *Rippy*, 285 F. 2d 43, 47 (C.A. 5). The validity of such a non-racial transfer provision is demonstrated by the cases upholding pupil placement laws whenever they were administered without relation to race (see *supra*, pp. 26–27).

A community is not only entitled to allow, but should encourage, pupils to transfer when the change will be of educational benefit. We see no reason why the appropriate school authorities should not recognize any bona fide problems of individual adjustment affecting students' educational welfare. But the test must genuinely be not the race but the benefit to the children. Racial segregation cannot be maintained by creating a presumption that requiring children to attend school with children of a different race is always or generally educationally and psychologically harmful. Moreover, such a transfer provision focussed upon the welfare of pupils would allow the transfer of Negro children to desegregated schools on the basis of a showing that this would be to their educational and psychological benefit. Cf. *Brown* v. *Board of Education*, 347 U.S. 483, 494.

We do not advocate any particular plan of desegregation. The plans summarized above are relevant only to show that there are a great many alternative ways of meeting whatever problems may result from requiring a few Negro or white students to attend schools largely attended by children of the other race. There is no evidence, nor even a suggestion, that some such procedure would not be fully practicable in Knoxville and Davidson County. In these circumstances at least, we submit, the transfer provisions explicitly based upon racial criteria and encouraging resegregation are invalid as parts of the present Knoxville and Davidson County plans of desegregation.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgments below should be reversed and the cases remanded to the respective district courts.

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